No. 89-1793 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

JOHN G. ROBERTS, JR.
Acting Solicitor General
STUART M. GERSON
Assistant Attorney General
DAVID L. SHAPIRO
Deputy Solicitor General
PAUL J. LARKIN, JR.
Assistant to the Solicitor General
ANTHONY J. STEINMEYER
JOHN F. DALY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether supervisory actions that were taken by federal regulators of financial institutions, and that required the exercise of policy discretion, fall within the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), regardless of whether those actions may be categorized as "operational" in nature.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and regulation: Page

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1793

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 885 F.2d 1284. The district court opinion (Pet. App. 21a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on October 17, 1989. A petition for rehearing was denied on January 5, 1990. Pet. App. 30a. On March 23 and April 27, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including May 17, 1990. The petition was filed on May 16, 1990, and was granted on June 18, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The relevant section of the Federal Tort Claims Act, 28 U.S.C. 2680(a), is reprinted in an appendix to this brief.

STATEMENT

This tort action arises out of regulatory activities undertaken by officials of the Federal Home Loan Bank Board (FHLBB or the Board) and the Federal Home Loan Bank-Dallas (FHLB-D), with respect to Independent American Savings Association (IASA), a now-failed Texas thrift institution. Respondent Thomas Gaubert, a major shareholder and former officer of IASA, brought this action under the Federal Tort Claims Act (FTCA); 28 U.S.C. 1346(b), 2671-2680. Respondent contends that he suffered personal financial losses because of IASA's failure, and he alleges that this failure was caused by negligence of federal regulators in their supervision of IASA. The sole issue presented for review is whether the court of appeals correctly interpreted the FTCA's discretionary function exception, 28 U.S.C. 2680(a).[1]

1. *Regulatory Background*

The context within which the actions at issue took place is the extensive statutory scheme for the federal regulation of financial institutions. As a state-chartered thrift institution whose accounts were insured by the Federal Savings and Loan Insurance Corporation (FSLIC), IASA was subject to federal regulation pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724-1730i (1988).[2]

These statutory powers were entrusted to a number of related federal bodies, all under the overall supervision of the Board. The Board itself was an independent

[1] Neither party has sought review of the other aspects of the court of appeals' decision, regarding respondent's ability under Texas law to assert his claims for (1) the diminution of the value of his corporate stock and (2) his loss of personal assets. See Pet. App. 14a-20a; pp. 13-14 note 12, *infra*.

[2] The regulatory scheme as here described is that in place in 1984 through 1986, the time of the actions at issue. As discussed below, many of the regulatory functions have been altered or shifted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183.

agency of the federal government, with broad responsibilities for the regulation of both federally chartered and state-chartered thrift institutions. See 12 U.S.C. 1437 (1988). FSLIC was a corporation that was established by Congress to provide insurance for deposits in both state and federally chartered thrift institutions and that operated under the direction of the Board. 12 U.S.C. 1725(a) (1988). FSLIC operated in two separate and legally distinct capacities—as a federal regulator (charged with protecting the insurance fund against undue risk by examining and regulating insured institutions), and as a receiver of failed institutions. The Federal Home Loan Banks, including FHLB-D, were regional banks established by the Board for the purpose of assisting member institutions. 12 U.S.C. 1423 (1988). The Board supervised the activities of the various FHLBs, and was specifically empowered to assign to the personnel of any FHLB most of the regulatory functions of the Board itself, or of FSLIC. 12 U.S.C. 1437(a) (1988).[3]

The regulatory powers of greatest relevance here are those provided in 12 U.S.C. 1729 and 1730 (1988). Section 1729(c), for example, empowered the Board, under certain circumstances, to appoint FSLIC as the conservator or receiver of an insured institution. Section 1730 conferred a wide range of enforcement authority on FSLIC, in its regulatory capacity, over state-chartered thrift institutions.[4] For example, Section 1730(b)

[3] In this case, it appears that the alleged actions of FHLB-D personnel would constitute actions on behalf of the relevant federal agencies, FHLBB or FSLIC, within the meaning of the FTCA, 28 U.S.C. 2671, since the personnel were performing delegated functions for those agencies. We note that the question whether FHLB-D would itself be a "federal agency" for purposes of the FTCA is an undecided issue that is not posed by this case. Cf. *Colony First Federal Savings & Loan Ass'n* v. *FSLIC*, 643 F. Supp. 410, 416 n.4 (C.D. Cal. 1986) (noting but declining to decide this question).

[4] The Board itself directly exercised such authority over federally chartered thrifts, under the analogous provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464 (1988).

provided for formal proceedings that could result in the termination of FSLIC insurance. Section 1730(e) provided for proceedings in which FSLIC could issue orders requiring an insured institution to cease and desist from engaging in any practices found either to be in violation of a pertinent statute or regulation, or to constitute an unsafe or unsound banking practice. Section 1730(f) provided for expedited, temporary cease-and-desist orders under certain circumstances. Section 1730(g) provided for the suspension or removal of any officer or director of an insured institution on a number of grounds, including violations of a statute, regulation, or fiduciary duty. Pursuant to 12 U.S.C. 1730(m)(2), FSLIC also had broad investigatory powers in aid of its regulatory functions.

Not all instances of misconduct or regulatory concern have been handled by institution of such formal proceedings. Like other federal regulators, the Board and FSLIC have often engaged in more informal methods of ensuring compliance with regulatory standards. Regulators may, for example, forbear from initiating formal enforcement proceedings in exchange for assurances that regulated parties will refrain from certain conduct or take specified corrective steps. Federal agencies involved in the regulation of financial institutions have turned to such approaches frequently, especially in light of the growing case load confronting those agencies. See generally *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 330 (1963); Vartanian & Schley, *Bank Officer and Director Liability—Regulatory Actions*, 39 Bus. Law. 1021, 1027-1028 (1984). In a policy statement, FHLBB specifically addressed the use of such procedures, noting the appropriateness in many instances of "informal supervisory guidance" or negotiated "supervisory agreement[s]" in lieu of formal regulatory steps. See FHLBB Res. No. 82-381 (May 26, 1982).[5]

[5] Subsequent to the events upon which this action is based, Congress enacted major changes in the statutory scheme for federal thrift regulation in FIRREA. Although that legislation does not directly affect this litigation or any of the underlying regulatory actions, we set forth a very brief sketch of its provisions to place the present controversy in context, and to reflect the continuing importance of the issues presented in this case.

FIRREA was a response to what Congress termed a "crisis" in the thrift industry. See H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 294, 302-305 (1989). This crisis was brought about, in Congress's view, by a combination of factors including precipitous growth by many institutions—often combined with poor management and fraudulent practices—and the lack of resources for sufficiently vigorous enforcement efforts. *Id.* at 298-301. Congress sought to address these problems by fostering "stronger supervisory oversight" of thrift institutions. *Id.* at 307-308.

FIRREA makes major changes in the federal regulatory structure and has created new federal agencies to deal with the affairs of failed thrift institutions, yet it has not altered the basic regulatory tools available to deal with the problems of troubled institutions. For example, while FIRREA abolishes FHLBB and FSLIC and repeals the specific statutory enforcement provisions invoked in this case, see FIRREA §§ 401, 407, 103 Stat. 354-357, 363, it assigns substantially similar authority for examinations, cease-and-desist orders, and the imposition of receiverships to the Federal Deposit Insurance Corporation and the newly created Office of Thrift Supervision. FIRREA §§ 201, 301, 103 Stat. 187-188, 277-343. Despite other provisions of FIRREA that enhance enforcement authority in various ways, see FIRREA §§ 901-968, 103 Stat. 446-506, there is no reason to doubt that these agencies will continue to use the sort of informal, supervisory techniques used in the present case, in an effort to assist regulated institutions without invoking formal regulatory procedures. Indeed, the regulatory workload engendered by the large number of troubled thrift institutions across the Nation will undoubtedly require federal regulators to employ such techniques in order to provide the "vigilant and responsive" regulatory action mandated by Congress. H.R. Rep. No. 54(I), *supra*, at 291.

2. *Factual Background* [6]

In 1983, respondent acquired a controlling interest in Citizens Savings and Loan Association, a federally insured thrift institution chartered by the State of Texas.

[6] In granting the motion of the United States to dismiss, the district court did not resolve any disputed factual issues; those issues therefore remain to be resolved if the action is not dismissed. The background stated here is drawn either from the amended com-

A new board of directors (of which respondent was the chairman) changed the name of the institution to Independent American Savings Association and embarked on a course of substantial expansion. J.A. 7-8; Exh. J, at 58-59. The actions on which respondent's complaint is based began in early 1984.

In May 1984, the FHLB-Des Moines requested the institution of an investigation, pursuant to 12 U.S.C. 1730(m)(2), of certain operations of Capitol Savings and Loan Association, an Iowa institution in which respondent had had substantial dealings.[7] During that period, IASA proposed to enter into two transactions that would greatly increase the scope of its operations: the purchase of Investex Savings Association, a troubled Texas thrift institution; and the purchase of 22 branch offices from United Savings Association, another Texas thrift. See Amended Compl. paras. 16-19, J.A. 9-10;

---

plaint, J.A. 6-19, or from certain exhibits to the motion of the United States to dismiss the complaint that were provided to the district court "for background only." Memo. in Support of Mot. of the United States to Dis. the Compl. 32 n.22 (dated Mar. 17, 1988). These exhibits include various written agreements between federal regulators and respondent or IASA, a January 1987 FHLBB memorandum recommending the appointment of a receiver for IASA, and an April 1987 report by an independent counsel engaged by FHLBB to look into respondent's allegations of misconduct by personnel of FHLB-D, FSLIC, and FHLBB. The exhibits are cited herein as "Exh. ——."

Because the government's dismissal motion based on the discretionary function exception went to subject matter jurisdiction, these background materials were properly before the district court. See *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947); 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 213 (2d ed. 1990) ("When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other matter to support the motion.").

[7] See Report of Independent Counsel Aubrey B. Hardwell, Jr., to Chairman Edwin J. Gray, Federal Home Loan Bank Board 64-65 (Apr. 21, 1987) (Exh. J); Amended Compl. para. 12, J.A. 9.

Exh. J, at 60-63.[8] Completion of those transactions required approval by federal regulators. See 12 U.S.C. 1730(q) (1988); 12 C.F.R. Pt. 574.

In part because of concerns of possible misconduct by respondent relating to the Iowa institution, federal officials had misgivings about permitting this substantial expansion of IASA under respondent's control. See Exh. J, at 68. Some officials also expressed concern as to whether IASA, with the greatly increased assets and liabilities it would have following the proposed transactions, would be adequately capitalized. *Id.* at 69. In late 1984, FHLB-D and FHLBB staff recommended the institution of formal proceedings to remove respondent as an officer and director of IASA and prohibit his further involvement with its management (pursuant to 12 U.S.C. 1730(g)(2) (1988)), and the institution of a formal examination of IASA (pursuant to 12 U.S.C. 1730(m)(2) (1988)).[9] Meanwhile, federal regulators were engaged in negotiations with IASA and respondent concerning possible ways of allaying these concerns and allowing the transactions to go forward. See Exh. J, at 69-74. These negotiations resulted in the execution in December 1984 of a written "neutralization agreement" between respondent and the federal regulators. See Amended

---

[8] Respondent's allegations are ambiguous with respect to the initiative for this merger. While the heading above paragraph 16 of the amended complaint recites, "Federal Agencies Seek To Merge IASA With Investex," paragraph 16 itself refers to IASA's "application." J.A. 9. Resolution of any factual dispute on this point is unnecessary to the adjudication of this case. The court of appeals decided the case on the premise that FHLBB "wanted IASA to merge" with Investex, Pet. App. 2a, and ruled that any such "decision to merger IASA with Investex * * * was a policy oriented decision protected [under the discretionary function exception]." Pet. App. 13a-14a. Respondent has not sought review of that portion of the court of appeals' ruling.

[9] See Recommendation for Appointment of a Receiver for Independent American Savings Association 27-28 (Jan. 21, 1987) (Exh. C).

Compl. paras. 12-15, J.A. 9; Exh. J, at 77-78. The agreement provided that respondent would resign from management positions at IASA and refrain from any participation in the management of the institution, and imposed limits on respondent's ability to vote or transfer his IASA stock. Exh. J, at 77-78. The agreement also included a guarantee by respondent of IASA's net worth, backed by his pledge of personal assets. See Amended Compl. para. 14, J.A. 9; Exh. J, at 78. Federal regulators approved the proposed acquisitions noted above, Exh. J, at 78, and offered advice and assistance to IASA in carrying out these transactions. Amended Compl. para. 19, J.A. 10.

During 1985, investigations continued, and in August 1985 the FHLBB staff recommended the institution of proceedings, pursuant to 12 U.S.C. 1730(g)(2) (1988), permanently to bar respondent from involvement with FSLIC-insured institutions. See Exh. J, at 95-105; Exh. C, at 31-32. Discussions continued between respondent and federal regulators in late 1985, resulting in a second agreement, set forth in a letter from respondent to the FHLBB dated December 17, 1985. Exh. D. Under the terms of that agreement, respondent agreed to remove himself permanently from IASA's management and not to serve as an officer or director of any FSLIC-insured institution without prior approval. In return, FHLBB agreed to discontinue the investigation it was conducting under 12 U.S.C. 1730(m)(2) (1988) and to forbear from the institution of removal proceedings under 12 U.S.C. 1730(g)(2) (1988).

Early in 1986, additional matters came to light that increased the federal regulators' concerns regarding IASA's soundness. In February and March 1986, reports from a management consulting firm indicated that IASA was in a precarious financial situation. Exh. C, at 39. The report cited numerous possible regulatory violations, as well as unsafe and unsound practices. *Ibid.* FHLBB personnel commenced a special examination of IASA on March 3, 1986, which also revealed unsafe and

unsound financial practices and other regulatory violations. *Id.* at 39-41. In lieu of instituting formal proceedings against IASA, the federal regulators entered into discussions with IASA, as a result of which IASA officers and directors resigned and were replaced by individuals approved by FHLB-D personnel. See Amended Compl. paras. 20-32, J.A. 10-13.[10] FHLB-D provided indemnification of the new officers and directors in order to induce them to take on these responsibilities. *Id.* para. 32, J.A. 13; Exh. C, at 46.

According to the reports mentioned above and others prepared by accounting and consulting firms, IASA at this time faced substantial difficulties—including books that were not in condition to permit a reliable audit, and the prospect of continuing financial losses. See Exh. C, at 47-48. The new IASA officers and directors took various steps aimed at dealing with this situation, such as making major adjustments to IASA's financial statements and placing an IASA subsidiary into bankruptcy. *Id.* at 48-49. During this time, federal regulators continued to forbear from taking formal regulatory actions against IASA, but consulted regularly with IASA personnel about their efforts to deal with the situation. See Amended Compl. paras. 33-37, J.A. 13-16. As alleged in the amended complaint, FHLB-D officials frequently gave advice to IASA managers on a variety of topics. *Id.* para. 33, J.A. 14. Specifically, the amended complaint charges that FHLB-D personnel "arranged for" the hiring of a particular consultant by IASA, urged IASA to convert to federally chartered status, gave advice concerning the placement of subsidiaries into bankruptcy, mediated salary disputes involving IASA officers, reviewed draft litigation papers, and "intervened" in deal-

[10] Federal regulatory authorities have since brought two actions against respondent and other former IASA officers and directors for negligence and breach of fiduciary duties to IASA. See *FDIC, As Manager of the FSLIC Resolution Fund* v. *Gaubert*, No. CA3-90-1196-G (N.D. Tex. filed May 18, 1990); *FSLIC* v. *Crowe*, No. CA 3-86-3166-T (N.D. Tex. dated May 4, 1989).

ings between IASA and a state regulatory body. *Id.* para. 34, J.A. 14-16.

Whether in spite of or (as respondent alleges) because of these efforts, IASA's condition continued to decline. In January 1987, FHLBB began consideration of a recommendation that IASA be put into receivership. See Exh. C. At about the same time, the IASA shareholders declined to elect a slate of directors allegedly chosen by federal regulators, and reinstated some of the individuals who had earlier been on the board. See Amended Compl. para. 40, J.A. 17; *Gaubert* v. *FHLBB*, 863 F.2d 59, 61 (D.C. Cir. 1988). Subsequently, the State of Texas became conservator, there was another board change, and ultimately in May 1987 the Texas Savings and Loan Department closed IASA. FHLBB thereupon promptly exercised its authority, pursuant to 12 U.S.C. 1729(c)(2) (1988), to appoint FSLIC as the receiver. See *Gaubert* v. *Hendricks*, 679 F. Supp. 622, 623 (N.D. Tex. 1988).

3. *Proceedings Below*

a. Following the denial of an administrative claim made under 28 U.S.C. 2675, respondent instituted this FTCA action in April 1988.[11] As amended, respondent's

[11] The present action is one of several that respondent has filed arising out of the same underlying events. He also filed two derivative actions on behalf of IASA—one against FHLBB and other federal agencies, and one against the IASA directors elected in 1986—both of which were dismissed. See *Gaubert* v. *FHLBB*, Civ. No. 87-1682-LFO (D.D.C. Feb. 12, 1988) (*reprinted at* Exh. A), aff'd, 863 F.2d 59 (D.C. Cir. 1988); *Gaubert* v. *Hendricks*, 679 F. Supp. 622 (N.D. Tex. 1988). He also filed an action against various federal officials in their individual capacities, alleging both common law torts and constitutional torts under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). *Gaubert* v. *Gray*, No. 87-3500 (D.D.C. filed Dec. 24, 1987). A motion to dismiss that action is now pending. More recently, respondent has filed an action against the United States in the Claims Court, alleging that the actions of federal regulators amounted to a "taking" of his property in violation of the Fifth Amendment, as well as several breach of contract counts purportedly based on the neutralization agreement. *Gaubert* v. *United States*, No. 90-434 C (Cl. Ct. filed May 21, 1990).

Respondent also raised regulatory negligence as a counterclaim in *FSLIC* v. *Crowe*, *supra*. That counterclaim was dismissed on June 16, 1990.

complaint contained allegations regarding most of the matters discussed above, including the neutralization agreement, Amended Compl. paras. 12-15, J.A. 9; the actions surrounding the approval of the Investex merger, *id.* paras. 16-19, J.A. 9-10; the replacement of IASA's management, *id.* paras. 20-26, J.A. 10-11; the installation of a new board of directors, *id.* paras. 27-32, J.A. 12-13; and the subsequent involvement of federal regulators in IASA's "day-to-day operations," *id.* paras. 33-37, J.A. 13-16. Respondent further alleged that federal officials acted negligently in carrying out these activities, *id.* paras. 44-58, J.A. 17-19, and that IASA's insolvency and other problems were caused by such negligence, *id.* paras. 38-39, 49, 59, J.A. 16-17, 18, 19.

The United States moved to dismiss on the ground that the challenged actions were exempt from suit under the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). The district court granted the motion, holding that all of respondent's claims were barred by that exception. Pet. App. 21a-26a. The court recognized that the amended complaint focused on actions suggested to IASA by federal regulators, in which IASA was induced to acquiesce by the threat of receivership or other formal regulatory action. *Id.* at 23a-24a. Concluding that a decision to seek receivership would unquestionably fall within the discretionary function exception, the court determined that a decision to exert informal suasion in lieu of such formal enforcement is likewise discretionary in nature and therefore also within the exception. *Id.* at 24a-25a. Accordingly, the court concluded that the present action fell outside the FTCA's limited waiver of sovereign immunity. *Id.* at 25a-26a.

b. The court of appeals reversed in part, holding that as a matter of law certain actions taken by the federal

regulators were not subject to the discretionary function exception. Pet. App. 1a-20a.

The court began its analysis of the discretionary function exception with a discussion of this Court's ruling in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). Pet. App. 6a-7a. While acknowledging that the government had not invoked the discretionary function exception in that case, the court of appeals referred to the case as having established a "principled distinction between policy decisions and operational actions," a distinction that "still retains its force today and is dispositive of this case." *Id.* at 7a. The court of appeals then discussed this Court's recent discretionary function cases, *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), and *Berkovitz* v. *United States*, 486 U.S. 531 (1988). Pet. App. 7a-11a. With respect to *Varig Airlines*, the court noted this Court's central holding that the discretionary function exception is aimed at "prevent[ing] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 9a (quoting *Varig Airlines*, 467 U.S. at 814). And in *Berkovitz*, the court of appeals observed, the discretionary function analysis had been ruled unavailable where government officials violate express statutory or regulatory requirements. *Id.* at 10a. The court then stated that the holding in *Berkovitz* was "[u]nfortunately" not dispositive of this case, since FHLBB and FHLB-D officials did not violate any express statutory or regulatory provisions. *Id.* at 11a. The court found guidance, however, in a footnote in *Berkovitz*, which cited *Indian Towing* as an example of a case not involving the sort of policy discretion covered by the discretionary function exception. *Ibid.* (quoting *Berkovitz*, 486 U.S. at 538 n.3). In the court of appeals' view, "[a]ny doubts about the sustained viability of th[e] ["discretionary function/operational activity"] distinction were put to rest" by that footnote. *Ibid.* Thus, the court concluded, any activity that is

"operational in nature" necessarily falls outside the scope of the exception. *Id.* at 12a. The court stated, in summary, that "the FHLBB and FHLB-Dallas officials were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line established in *Indian Towing*." *Id.* at 12a-13a.

Applying what it called "the *Indian Towing* test," Pet. App. 13a, to the activities at issue in this case, the court of appeals agreed with the district court about the initial actions taken by the federal regulators. "Clearly, the decision to merge IASA with Investex and seek a neutralization agreement from [respondent] was a policy oriented decision protected by § 2680(a)." *Id.* at 13a-14a. "Similarly," the court went on, "the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision, are protected under the discretionary function exception." *Id.* at 14a. The court held, however, that the federal regulators ceased to perform "discretionary functions"

> when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in ¶¶ 33-43 of [respondent's] amended complaint.

Ibid. On the basis of this holding, the court remanded the case to the district court for further proceedings. *Id.* at 19a-20a.[12]

---

[12] Because the court of appeals reversed a portion of the district court's judgment on the discretionary function exception, it addressed certain issues pretermitted by the district court. Pet. App. 14a-20a. The court held that, under Texas law regarding injuries suffered by corporations, respondent could not sue for the alleged diminution of the value of his IASA stock. *Id.* at 19a. But with respect to the personal property respondent posted as a guarantee as part of the neutralization agreement—alleged to be worth $25

SUMMARY OF ARGUMENT

A. The court of appeals erred by deciding the discretionary function issue in this case without carefully assessing the nature of the discretion exercised, and by relying instead on a mechanical test that finds no support in the language, history, or policies of the FTCA. Congress considered the discretionary function exception an important element of the FTCA, and drafted it broadly to cover a wide range of "discretionary" governmental activities. The exception, which has its roots in concern for the discretion of federal regulatory agencies, reaches even clearly negligent acts, and—by its express terms—even those constituting abuse of discretion.

This Court first addressed the discretionary function exception in *Dalehite* v. *United States*, 346 U.S. 15 (1953). There, the Court, drawing heavily on the legislative history of the FTCA and historic legal concepts of "discretionary" governmental activity, gave a broad reading to the exception, concluding that "[w]here there is room for policy judgment and decision there is discretion." *Id.* at 36. Subsequently, in *Varig Airlines*, the Court reaffirmed the principles of *Dalehite* and refuted any notion that intervening cases had undermined its authority. *Varig Airlines* reaffirmed that "it is the nature of the conduct," regardless of the level at which it is taken, that governs application of the discretionary function exception, and emphasized that actions of the government "in its role as a regulator" lie at the core of the exception. 467 U.S. at 813-814.

In its most recent discretionary function case, *Berkovitz* v. *United States*, 486 U.S. 531 (1988), the Court dealt with the particular issue of governmental actions alleged to be in violation of specific statutory or policy mandates. Ruling that where a specific course of action is prescribed

---

million—the court ruled that respondent might be able to maintain a cause of action. *Ibid.* The court remanded the case to the district court for resolution of that state law issue. *Id.* at 19a-20a.

by law there can be no discretion at all, the Court concluded that the exception would not apply to such cases. Otherwise, however, the Court reaffirmed the vitality of the basic test of *Dalehite* and *Varig Airlines*, which remain the controlling precedents in cases where there is no contention that federal officials violated specific legal mandates.

In this case, the court of appeals explicitly acknowledged that the central principle of *Berkovitz* is inapt, because the federal officials here violated no express legal mandate. The court failed, however, to apply the principles of *Dalehite* and *Varig Airlines*, relying instead on a mechanical exclusion from the discretionary function exception of all "operational" activities. Contrary to the lower court's supposition, such a test is not supported by this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), and is inconsistent with *Dalehite* and *Varig Airlines*.

The "operational" limitation espoused by the court of appeals is contrary to the language, history, and policies of the FTCA. The text of the discretionary function exception itself contains no qualification excluding "operational" actions. Moreover, the examples of "discretionary" actions cited in the legislative history of the FTCA confirm that the exception applies to "operational level" activities in many instances. The court of appeals' artificial limitation would also violate the basic principle, established in *Dalehite* and *Varig Airlines*, that application of the exception depends upon the nature of the discretion exercised, not the level at which action is taken.

B. Because the court of appeals failed to apply the proper test in making its discretionary function ruling, this Court could simply reverse on that ground, and remand for consideration on the basis of the correct legal principles. But in light of the importance of this issue to federal efforts to cope with the crisis facing the savings and loan industry, we submit that it would be preferable, and appropriate on this record, for the Court

itself to apply the correct standard and uphold the district court's judgment.

Nearly all of the factual assertions in the amended complaint that the court of appeals characterized as "operational" in nature consisted of advice and recommendations made by federal regulators to IASA managers and directors. Providing the sort of advice federal officials are alleged to have offered IASA on various complex commercial matters obviously required the exercise of discretion. Even without reference to the regulatory context in which the advice was given, such activities fall within the discretionary function exception because they necessarily relate to economic policy. As reflected in *Dalehite* and in numerous decisions of the lower courts, governmental decisions significantly affecting the expenditure of public funds, or otherwise involving discretionary commercial activities, fall squarely within the scope of actions the discretionary function exception was designed to shield.

Moreover, the regulatory context in which any such advice was offered here removes any question as to its status under the exception. The courts have consistently recognized that invocation of any of the broad powers that federal regulatory agencies possess with respect to financial institutions—such as issuing a cease and desist order or imposing a receivership—is a discretionary matter falling within the exception. Where, as here, federal officials instead act informally, seeking to assist an institution take steps to avoid sterner regulatory actions, those actions are still integral to the federal officials' regulatory mission, and still require discretionary, policy-oriented decisions. And any recommendations that federal regulators may have made to state regulatory officials regarding discretionary decisions by those officials fall even more clearly into the core area of governmental discretion protected by the FTCA exception.

While the sovereign immunity of the United States has been partially waived by the FTCA, the courts have rec-

ognized modern policy bases that give that doctrine continuing vitality where it has not been so waived. The discretionary function exception serves these policies, all of which are implicated in the present case. Imposition of tort liability in circumstances such as these would inhibit vigorous decision making by federal officials at a time of acknowledged crisis. It also would impermissibly skew regulatory actions by imposing liability where officials seek to assist financial institutions informally, but not where they exercise more intrusive regulatory powers. Given the scope of the difficulties facing the savings and loan industry today, and the great losses that may result from the failure of a thrift institution, permitting actions of this sort would also expose the United States to enormous and unpredictable liabilities—liabilities that Congress has not determined to accept. Finally, the deference due the judgments of the federal banking agencies cautions against judicial intrusion into an area, like this one, that calls for difficult judgments ill-suited to judicial inquiry.

ARGUMENT

THE CHALLENGED ACTIONS OF THE FEDERAL REGULATORY OFFICIALS ALL FIT WITHIN THE DISCRETIONARY FUNCTION EXCEPTION TO THE FTCA

A. The Court Of Appeals Erred In Concluding That The Discretionary Function Exception Does Not Apply To "Operational" Activities

The court of appeals' key holding was that certain actions taken by federal thrift regulators fell outside the FTCA discretionary function exception because they were operational in nature. That ruling was incorrect as a matter of law because it was based entirely on a limitation found nowhere in the text of the FTCA and unsupported by the policies and history of that law as well as this Court's decisions interpreting it. The relevant question is not whether the challenged actions of the federal regulators were "operational," but whether those actions were "discretionary," *i.e.*, whether they were they "grounded in social, economic, and political policy," *Varig Airlines*, 467 U.S. at 814, and taken in a context affording those officials "room for policy judgment and decision," *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953).

1. *The discretionary function exception protects the judgments of federal officials that are grounded in social, economic, or political policy*

a. The FTCA was enacted as part of the Legislative Reorganization Act of 1946, ch. 753, Tit. IV, 60 Stat. 842, which contained a broad range of initiatives to streamline and improve the workings of Congress itself. While the FTCA's waiver of sovereign immunity for tort actions was the product of long congressional consideration, see *Dalehite*, 346 U.S. at 24-25, its ultimate passage was prompted in large part by the need "to relieve Congress of [the] time-consuming chore" of considering private bills for the relief of citizens with tort claims against

the government. See S. Rep. No. 1400, 79th Cong., 2d Sess. 7 (1946); *Dalehite*, 346 U.S. at 24-25 & n.9. Congress focused particularly on the need to provide judicial remedies for the burgeoning number of commonplace torts, including "such torts as negligence in the operation of vehicles," S. Rep. No. 1400, *supra*, at 31, stemming from the expansion of the federal government. See *Dalehite*, 346 U.S. at 28 & nn.19-20.

Congress used caution in approaching the historic step of waiving the sovereign immunity of the United States for tort claims. It included in the FTCA a number of exceptions to that waiver, and several of these exceptions are geared to situations where the imposition of tort liability would be novel or the impact of liability on the public fisc could be large and unpredictable. For example, specific exceptions bar claims based on the loss or miscarriage of mail, 28 U.S.C. 2680(b), the assessment of taxes or customs duties or the detention of goods by law enforcement officials, 28 U.S.C. 2680(c), or combatant activities of military forces in time of war, 28 U.S.C. 2680(j). All of these exceptions, including the discretionary function exception of 28 U.S.C. 2680(a) at issue here, are limitations on the FTCA's waiver of sovereign immunity and therefore must be read in light of the principle that statutes waiving the immunity of the United States from suit "are to be construed strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951). See *Dalehite*, 346 U.S. at 31; *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986).

This case involves one of the broadest and most important of the FTCA exceptions, that for discretionary functions. While the legislative history of the final passage of the FTCA in 1946 sheds little light on this provision, see, *e.g.*, S. Rep. No. 1400, *supra*, at 33 (paraphrasing FTCA exceptions without elaboration), this Court has recognized the significance of earlier congressional con-

sideration. See *Dalehite*, 346 U.S. at 26-30. The predecessors of the present exception were agency-specific exceptions precluding tort liability based on the activities of two major federal regulatory bodies, the Federal Trade Commission and the Securities and Exchange Commission. See *Varig Airlines*, 467 U.S. at 809 & n.8; *Dalehite*, 346 U.S. at 26 & n.11. In 1942, the 77th Congress generalized this exception, drafting a provision that broadly applied to all federal regulatory activities and numerous other areas in which federal officials exercise discretion. The text of the exception drafted by that Congress is identical to the one ultimately adopted in 1946 and still in force today. *Varig Airlines*, 467 U.S. at 809.

As this Court has repeatedly recognized, both the Executive sponsors of the legislation and the congressional committees that approved the language of the exception regarded it as a "highly important" element of the FTCA. *Dalehite*, 346 U.S. at 29 n.21 (quoting H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942)); *Varig Airlines*, 467 U.S. at 809 (quoting *Hearings on H.R. 5373 and H.R. 6433 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 33 (1942) (statement of Assistant Attorney General Shea)). The explanation of the exception as presented by the Executive and as adopted by the congressional committees[13] reflects the breadth and diversity of the situations to which it applies. The House committee explained, for example, that the exception would bar liability for negligent acts carried out in conjunction with an authorized flood control or irrigation project, even where the same sort of conduct would be actionable if conducted by a private party. H.R. Rep. No. 2245, *supra*, at 10.

[13] The Court noted in *Varig Airlines* that the key passage in the committee reports was based almost verbatim on the remarks of Assistant Attorney General Shea. 467 U.S. at 810 n.9. The text of that passage, as it appeared in H.R. Rep. No. 2245, is set out in full in *Dalehite*, 346 U.S. at 29-30 n.21.

Of special relevance to this case, the committee also explained how the second clause of the exception, which focuses on "discretionary function[s]," would operate. The committee stated that the exception was

> designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion.

H.R. Rep. No. 2245, *supra*, at 10. As that passage reflects, Congress specifically intended the exception to reach even actions taken negligently, or in a manner constituting an abuse of discretion, and in doing so had the activities of federal regulatory agencies foremost in mind.

b. As the Court noted in *Dalehite*, its first case to involve the discretionary function exception, Congress's use of the language of "discretion" in the second phrase of 28 U.S.C. 2680(a) reflects a "concept of substantial historical ancestry in American law"—that of "the discretion of the executive or the administrator to act according to one's judgment of the best course." 346 U.S. at 34 (citing, inter alia, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). The "discretion" protected by the FTCA is similar to that recognized in other areas such as mandamus and injunction suits, where the courts have traditionally distinguished between the sort of "ministerial" duties of public officials that the courts may direct and other sorts of duties, those involving "nice issues of judgment and choice," that are properly left to

the discretion of the Executive branch. See, *e.g.*, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317 (1958) (declining to intervene in the setting of tolls for the Panama Canal, on the ground that it involved discretionary choices regarding accounting methods). See generally 2 L. Jayson, *Handling Federal Tort Claims* § 248.03 (1989).

In applying those principles in *Dalehite*, this Court concluded that Congress intended the exception to embrace a broad range of "discretionary" activities. 346 U.S. at 24-34. The Court flatly rejected the plaintiffs' argument that the exception applies only to high-level policy decisions. *Id.* at 34-35. The Court held instead that

> the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.

Id. at 35-36 (footnote omitted). The breadth of the "discretionary" activities to which that reasoning applies is also apparent from the manner in which *Dalehite* dealt with the various alleged acts of negligence at issue, all of which arose from a devastating shipboard explosion of fertilizer bound for Europe as part of a federal post-war relief program. The Court gave short shrift to any notion that the cabinet-level decision to export the fertilizer, or a decision to proceed with its manufacture without conducting further safety tests, could be anything but "discretionary" under the FTCA. *Id.* at 37-38. The Court then went on to consider more specific allegations of negligence in decisions relating to the actual manufacture of the fertilizer. *Id.* at 38-42. The Court determined, for example, that the decision to use a particular type of coating, although based largely on technical factors, necessarily involved the balancing of competing considerations and had ramifications for the feasibility of the program. *Id.* at 40. Similarly, a decision concerning the temperature at which to bag the fertilizer fell within the exception because it involved a balancing of safety considerations against increases in production costs. *Id.* at 40-41. The Court also held that the discretionary function exception covered the actions of the Coast Guard in policing the storage and loading of the fertilizer, stating that such actions were "classically within the exception." *Id.* at 43.

After *Dalehite*, this Court did not again squarely address the discretionary function exception until *Varig Airlines*. There, the Court reviewed the language and history of the exception, and expressly reaffirmed its analysis in *Dalehite*. 467 U.S. at 808-812. The Court also specifically refuted any notion that its intervening decisions had somehow undermined the authority of that case. *Id.* at 812-813 & n.10 (discussing *Indian Towing*, *supra*, *United States* v. *Union Trust Co.*, 350 U.S. 907 (1955), and *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957)). All of those cases, the Court noted, dealt with issues other than the discretionary function exception,[14] and none of them could be read as detracting from the broad reading given that exception in *Dalehite*. *Ibid.*

In *Varig Airlines*, the Court noted two key "factors useful in determining when the acts of a Government employee are protected from liability by § 2680(a)." 467 U.S. at 813. First, the Court reaffirmed the notion, implicit in *Dalehite*, that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Ibid.* Second, the Court observed that "whatever

---

[14] With respect to *Indian Towing*, for example, the Court found it "significant[]" that "the Government *conceded* that the discretionary function exception was not implicated * * *, arguing instead that the Act contained an implied exemption from liability for 'uniquely governmental functions.'" 467 U.S. at 812.

else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Id.* at 813-814. That proposition, the Court held, was especially clear from the legislative history of the FTCA, which "[t]ime and again * * * refers to the acts of regulatory agencies as examples of those covered by the exception." *Id.* at 814. The underlying basis for the exception, the Court summarized, was Congress's intention

> to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."

Ibid. (quoting *United States* v. *Muniz*, 374 U.S. 150, 163 (1963)).

As in *Dalehite*, the Court's application of that test illuminated the breadth and importance of the exception, particularly in the regulatory context. In *Varig Airlines*, several groups of plaintiffs alleged, after a number of airplane crashes, that the Federal Aviation Administration (FAA) had been negligent in its inspection and certification of the aircraft in question. In applying the discretionary function exception to these claims, the Court started by noting that the FAA had chosen to carry out its statutory inspection and certification authority by means of a "spot-check" program, in which FAA inspectors had broad inspection authority but in which it was recognized that the primary responsibility for aircraft safety lay with the manufacturers. 467 U.S. at 816-819. The decision to institute such a "spot-check" regime, the Court held, easily fell within the discretionary function exception, because such decisions regarding the establishment of priorities and the balancing of enforcement goals

against staffing and funding considerations implicated "discretionary regulatory authority of the most basic kind." *Id.* at 819-820.

The Court further held that the actions of individual FAA inspectors in conducting inspections were also sufficiently "discretionary" to fall within the exception, since those employees were "empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." 467 U.S. at 820. Since the numerous mundane choices made by the inspectors involved "calculated risks" requiring judgments concerning "the advancement of a governmental purpose," the Court ruled that any alleged negligence in making those choices "falls squarely within the discretionary function exception of § 2680(a)." *Ibid.*

This Court subsequently addressed the discretionary function exception in *Berkovitz* v. *United States*, 486 U.S. 531 (1988), a case involving claims of negligence in the approval of an oral polio vaccine. Reasoning that "discretion" necessarily entails "judgment or choice," the Court concluded that there can be no discretion where "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," thereby leaving no choice. *Id.* at 536. In other words, the discretionary function exception applies only when "the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 537.[15] At the same time, *Berkovitz* reaffirmed the rule stated in *Dalehite* and reiterated in *Varig Airlines* that "[w]here there is room for policy judgment and decision there is discretion." *Ibid.* (quoting *Dalehite*, 346 U.S. at 36).

---

[15] *Berkovitz* rejected the argument that the discretionary function exception is applicable to "any and all acts arising out of the regulatory programs of federal agencies." 486 U.S. at 538. We do not make any such argument in this case.

2. *The "discretionary" actions of federal officials are immune from suit under the FTCA regardless of whether those actions are "operational"*

a. In the wake of *Berkovitz*, some lower courts have characterized the discretionary function inquiry—accurately, in our view—as requiring a two-step analysis. See *Ayer* v. *United States*, 902 F.2d 1038, 1041 (1st Cir. 1990); *Kennewick Irrigation Dist.* v. *United States*, 880 F.2d 1018, 1025 (9th Cir. 1989). First, a court must consider whether the decision in question involves "an element of choice." *Ayer*, 902 F.2d at 1041. If not, the holding of *Berkovitz* controls, and the action is outside the exception. But if the action entails an element of choice, the question then becomes "whether the decision involved the *kind* of judgment Congress intended to protect." *Ibid.* That was the central issue addressed in *Dalehite* and *Varig Airlines*, decisions the Court did not purport to question or modify in *Berkovitz*. See *Ayer*, 902 F.2d at 1041-1042; *Kennewick Irrigation Dist.*, 880 F.2d at 1024-1025.

The court of appeals here undertook the first step in that analysis. It readily acknowledged that the challenged actions of federal officials were not dictated by specific statutory or regulatory directives. The court noted that *Berkovitz* "is not dispositive" of this case ("[u]nfortunately" in its view) since "the actions of the FHLBB and FHLB-Dallas were not as closely guided by statute [as in *Berkovitz*]." Pet. App. 11a. Indeed, the court expressly noted that "[t]he authority of the FHLBB and FHLB-Dallas to take the actions that were taken in this case, although not guided by regulations, is unchallenged," and that "[t]he FHLBB and FHLB-Dallas officials did not have regulations telling them, at every turn, how to accomplish their goals for IASA." *Id.* at 12a. That conclusion—that federal regulatory agencies vested with authority to take formal actions necessarily also possess the more modest authority to use informal suasion in lieu of those formal actions—is also a sensible one.

As the Fifth Circuit explained in an earlier decision: "When a governmental agency holds such great powers over its offspring, even to the point of appointing a conservator or receiver to replace the management * * * it is difficult to hold that an informal request, even demand, to clean house would amount to an abuse of the statutory powers and discretion of the agency." *Miami Beach Federal Savings & Loan Ass'n* v. *Callander*, 256 F.2d 410, 414-415 (1958). See also *United States* v. *Philadelphia National Bank*, 374 U.S. at 330. Accordingly, there is no question in this case that the challenged actions of the federal officials were within the range of "permissible" regulatory actions. The only question is whether those actions involved the sort of judgment discussed in *Dalehite* and *Varig Airlines*.

But the court of appeals did not analyze the challenged actions in light of *Dalehite* and *Varig Airlines*. Instead, it applied a mechanical test, purportedly based on this Court's decision in *Indian Towing*, that turns on whether the allegedly tortious actions can be characterized as "operational in nature." See Pet. App. 12a-14a.[16] Since

[16] At this juncture the court of appeals also discussed at some length its prior ruling in *B & F Trawlers, Inc.* v. *United States*, 841 F.2d 626 (5th Cir. 1988), which it found distinguishable. Pet. App. 13a. This discussion in no way cures the basic flaws in the court of appeals' analysis, and indeed it further reflects the court's misapprehension of the proper approach to the discretionary function exception. The court below stated that *B & F Trawlers* was inapposite because the ruling in that case—upholding the applicability of the discretionary function exception—had rested on the proposition that in undertaking the action in question (towing a boat apprehended while smuggling illegal drugs), the United States acted with the sole purpose of protecting the general public. In this case, the court continued, the federal regulators acted with a dual purpose, and respondent was "within the pool of beneficiaries of government action here." Pet. App. 13a.

This reasoning is incorrect on two grounds. First, the court of appeals erred in its premise that respondent was an intended beneficiary of any actions of the federal regulators. On the contrary, federal regulators of financial institutions act solely for the benefit

that approach is contrary to the language and policies of the FTCA, the judgment of the court of appeals should be reversed.

b. Some courts have distinguished between "planning" and "operational" tasks for purposes of the discretionary function exception. The court below did not use that precise dichotomy; it distinguished between "policy" and "operational" activities. But the important point is that the court of appeals in this case, like several other courts, has excluded "operational" activities from the discretionary function exception even though the text of the FTCA does not. That judge-made limitation on an explicit congressional exception to the waiver of sovereign immunity is clearly unjustified.

The "operational" limitation on the discretionary function exception doubtless had its genesis in *Dalehite*, where the Court referred to the various specific decisions regarding the fertilizer manufacturing process as having been "made at a planning rather than operational level," 346 U.S. at 42. But in so doing the Court did not pur-

---

of the public and the federal insurance funds, and their regulatory actions give rise to no duty of care to the regulated institutions or their shareholders. See *North Dakota* v. *Merchants National Bank & Trust Co.*, 634 F.2d 368, 379 n.20 (8th Cir. 1980); *First State Bank* v. *United States*, 599 F.2d 558, 562-564 (3d Cir. 1979), cert. denied, 444 U.S. 1013 (1980); *Harmsen* v. *Smith*, 586 F.2d 156, 157 (9th Cir. 1978); *FDIC* v. *Renda*, 692 F. Supp. 128, 135 (D. Kan. 1988) (collecting cases); *FDIC* v. *Baker*, No. SA CV 89-386, 1990 U.S. Dist. LEXIS 7559, *16-*17 (C.D. Cal. June 18, 1990).

More fundamentally, any question of whether federal regulators might or might not have had a duty of due care to respondent, Pet. App. 13a, is a matter of substantive tort law, and thus has no bearing on the logically anterior (and dispositive) issue of whether the discretionary function *exception* precludes the courts from even considering this tort claim on its merits. See p. 30, *infra*. To the extent that *B & F Trawlers* may be seen as implicitly ruling that the existence of certain types of substantive duties of care may somehow result in FTCA liability regardless of the terms of the discretionary function exception, see 841 F.2d at 632-633, such a ruling is flatly contrary to the structure of the FTCA.

port to hold that action at the "planning level" was a *sine qua non* for discretionary functions, as the remainder of the *Dalehite* opinion shows. The Court went on to hold that the Coast Guard's actions in policing the loading and storage of the fertilizer were within the discretionary function exception, without giving any indication that those activities in any sense constituted "planning" or policy-making on a grand scale. See *id.* at 42-43. *Dalehite* therefore offers no support for an "operational" limitation on the discretionary function exception.

The Court again referred to "operational" activities in *Indian Towing*, noting that the allegedly tortious actions in that case—the failure to maintain a lighthouse in proper working order—were undoubtedly "operational" in nature. 350 U.S. at 64, 68. The court of appeals in this case, like some other courts, fastened on that language to conclude that *Indian Towing* established a "distinction between policy decisions and operational actions," and that actions falling on the "operational" side of this divide necessarily also fall beyond the discretionary function exception. Pet. App. 7a, 12a-13a. See also *United States* v. *Hunsucker*, 314 F.2d 98, 103-104 (9th Cir. 1962); *United States* v. *Gregory*, 300 F.2d 11, 13 (10th Cir. 1962). But that reasoning is fallacious. This Court expressly noted in *Indian Towing* that the United States had *conceded* that the actions in question were outside the discretionary function exception. 350 U.S. at 64. We recognize, of course, that the actions in *Indian Towing* were "operational" in nature under any standard, and that (as the government also admitted in *Indian Towing*, 350 U.S. at 64) the government can be held liable for some negligent operational activities. But it is illogical to conclude that since some such operational activities are nondiscretionary, all of them are. *Indian Towing* did not set down a comprehensive definition of discretionary functions, nor did it (in light of the government's concession) even adjudicate any discretionary function question. Rather it rejected the government's distinct claim

that the performance of "uniquely governmental" functions—even if not "discretionary" in any meaningful sense—necessarily falls outside the scope of the FTCA on the ground that there are no "like circumstances" in which a "private individual" may be held liable under the Act, 28 U.S.C. 2674. See 350 U.S. at 64, 66-67. Cf. *Varig Airlines*, 467 U.S. at 815 n.12 (noting the distinction between that argument and one based on the discretionary function exception).

Indian Towing also acknowledged that the "Good Samaritan" theory of tort liability followed by many States may be applied against the federal government when it undertakes a particular function (such as operating a lighthouse) and thereby "engender[s] reliance on the guidance afforded by the light," 350 U.S. at 69, 64-65. But that issue is one of substantive tort law, which is relevant only *after* it is decided that the threshold requirements of the FTCA are satisfied and that none of the exceptions in 28 U.S.C. 2680 is applicable. That proposition is clear from the structure of the FTCA. Section 2680 provides that the Act's waiver of the government's tort immunity "shall not apply" to the listed category of claims, and an exception to a waiver of sovereign immunity necessarily bars a claim even if the elements of liability are proved. See *Dalehite*, 346 U.S. at 32 ("Congress exercised care to protect the Government from claims, *however negligently caused*, that affected the governmental functions") (emphasis added); *Kennewick Irrigation Dist.*, 880 F.2d at 1029 ("negligence is simply irrelevant to the discretionary function inquiry"). In fact, *Indian Towing* recognized that FTCA actions remain subject to the exceptions by which Congress "circumscribed" the government's liability under that statute. 350 U.S. at 67-68.

Thus, neither *Dalehite* nor *Indian Towing* supports the notion that all "operational" activities necessarily fall outside the discretionary function exception. They and other decisions bear out what should be obvious from the

text of the FTCA itself—that a mechanical exclusion of "operational" activities is not faithful to that text or to the will of Congress. The discretionary function exception is not limited to the performance of a discretionary function by a federal agency or employee acting at a planning or policy formulation level. Rather, it bars *all* claims based on the performance of "discretionary" functions. The elimination of "operational" activity would add a qualification to the exception "which simply does not appear there," 2 L. Jayson, *supra*, § 249.07, at 12-183, contrary not only to the normal canons of statutory construction, but also to the frequent admonition that waivers of sovereign immunity are to be strictly construed. See *Shaw*, 478 U.S. at 315; *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *McMahon*, 342 U.S. at 27.[17]

c. The legislative history of the discretionary function exception provides no support for an "operational" limitation. To be sure, one particular category of operational activities—the operation of motor vehicles—lay at the core of what Congress intended the FTCA to cover. See S. Rep. No. 1400, *supra*, at 31; *Dalehite*, 346 U.S. at 28 & n.20. But it does not follow that all "operational" tasks are outside the discretionary function exception. On the contrary, the specific examples that Congress used in de-

---

[17] Congress recently considered and decided not to take action on a bill that would have inserted into the discretionary function exception the operational limitation imposed by the court of appeals in this case. See H.R. 3872, 100th Cong., 2d Sess. (1988) (limiting the exception to situations where "the discretionary function or duty involves the formulation of policy rather than the implementation of the policy at an operational level"); *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 10-11, 21-32, 47-56, 97-126, 199-242 (1988). As reflected in the statement of the principal congressional sponsor of this legislation, the proposed bill was clearly seen as altering the existing law established by *Varig Airlines*. See *id.* at 29-30 (statement of Rep. Owens).

scribing the exception belie any such notion. A "negligent exercise by the Treasury Department of the blacklisting or freezing powers," for instance, would quite likely occur at an operational rather than policy formulation level. See H.R. Rep. No. 2245, *supra*, at 10 (quoted in *Dalehite*, 346 U.S. at 29 n.21). Without distinguishing between "planning" or "policy formulation" on the one hand and "operational" activities on the other, Congress also said that the exception would apply to negligent actions involving "abuse of discretionary authority" by employees of regulatory agencies such as the FTC or SEC. *Ibid.*

d. The "operational" limitation adopted by the court below (and elsewhere [18]) is also contrary to the essential policies of the exception. In *Dalehite and Varig Airlines*, this Court recognized that, to serve its vital purpose, the discretionary function exception cannot be limited to "the initiation of program and activities," *Dalehite*, 346 U.S. at 35; "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813. An "operational" limitation would likely make application of the exception turn on the identity of the actor in many cases, by insulating the decisions of "planners" while holding the government liable for the actions of their "operational" subordinates, even if their actions also entailed a substantial degree of discretion.

---

[18] As we noted in our petition (at 19 & n.10), the court below is not the only court of appeals that purports to adhere to this distinction, even after *Varig Airlines*. See *E. Ritter & Co.* v. *United States*, 874 F.2d 1236, 1241 (8th Cir. 1989); *United States Fire Insurance Co.* v. *United States*, 806 F.2d 1529, 1535-1536 (11th Cir. 1986) (applying discretionary function exception under Public Vessels Act, but relying on FTCA case law). See also *Caplan* v. *United States*, 877 F.2d 1314, 1319 (6th Cir. 1989) (Martin, J., concurring).

The error in the court of appeals' rule, moreover, is vividly demonstrated by the holding in *Varig Airlines*. There, the broad decision of the FAA to implement its inspection authority by means of a "spot-check" system would doubtless be recognized by all as a "planning level" or "policy formulation" decision, to which the exception easily applies. But this Court also applied the exception to the actions of individual FAA inspectors, making individual inspection decisions, because those decisions inherently entailed discretionary judgments related to underlying policy considerations. 467 U.S. at 820. Those inspection decisions were (quite literally) "nuts and bolts" decisions that had nothing whatever to do with "planning," and are best seen as "operational."

Varig Airlines should have put an end to the use of the mechanical limitation adopted by the court below. At least one court of appeals has expressly so read *Varig Airlines*,[19] and the majority of other circuits appear also to have rejected that limitation.[20] The court below, however, read *Berkovitz* as somehow reviving a policy/operational "dichotomy." Pet. App. 11a. That reading was based entirely on a single footnote in *Berkovitz*, which referred to *Indian Towing* as "illuminat[ing] the appro-

---

[19] See *Begay* v. *United States*, 768 F.2d 1059, 1062-1063 n.2 (9th Cir. 1985); *Kennewick Irrigation Dist.*, 880 F.2d at 1022-1023. See also *Colorado State Bank* v. *FDIC*, 671 F. Supp. 706, 709 (D. Colo. 1987) (making the same point in the specific context of alleged negligence in the "operational" activities of FDIC in disposing of assets of failed financial institution).

[20] See *U.S. Fidelity & Guaranty Co.* v. *United States*, 837 F.2d 116, 121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); *Patterson* v. *United States*, 856 F.2d 670, 673-674 (1988), modified, 881 F.2d 127 (4th Cir. 1989) (en banc); *Allen* v. *United States*, 816 F.2d 1417, 1420 (10th Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Red Lake Band of Chippewa Indians* v. *United States*, 800 F.2d 1187, 1195-1196 (D.C. Cir. 1986); see also *Ayer* v. *United States*, 902 F.2d at 1041-1042 (not referring to the "operational" test as such, but adopting an approach that is consistent with the above cases).

priate scope of the discretionary function exception." *Berkovitz*, 486 U.S. at 538 n.3. But as noted above, *Indian Towing* illuminates the scope of the exception only in the limited sense of presenting one example of an unquestionably discretionary decision (whether to build a lighthouse in a particular location) and one example of conduct concededly falling outside the exception's scope (failing to maintain the lighthouse in proper working order). While that illustration offers a useful starting point, it cannot provide a comprehensive definition of activities that fall within the discretionary function exception. Still less does it establish a rule that any activity that may be classified as "operational" is, by that fact alone, outside the scope of the exception. Failing to maintain the lighthouse in *Indian Towing* fell beyond the discretionary function exception because it was not discretionary, not because it was "operational." As two other courts of appeals have expressly recognized, the reference to *Indian Towing* in footnote 3 in *Berkovitz* did not purport to undermine *Dalehite* and *Varig Airlines*.[21] Those cases still provide the definitive guide to the application of the discretionary function exception in cases, like this one, where there is no question whether government officials have violated laws or policies "specifically prescrib[ing] a course of action," *Berkovitz*, 486 U.S. at 536.

---

[21] See *Kennewick Irrigation Dist.*, 880 F.2d at 1024-1025; *Ayer*, 902 F.2d at 1042. While both courts found the reference to *Indian Towing* in *Berkovitz* somewhat "confusing," both courts ultimately determined that it could not have been intended to bring about the sort of fundamental change in the law that the court of appeals in the present case supposed. As the Ninth Circuit concluded in *Kennewick*, 880 F.2d at 1024-1025:

> The *Berkovitz* reference to *Indian Towing* must be read in the context of *Dalehite* and *Varig*. A matter does not fall outside of the discretionary function exception merely because the decision to embark on an activity has already been made. Were that the case, *Dalehite* and *Varig* would be eviscerated.

e. If further reason were needed to reject an "operational" limitation, the inherent vagueness of that term and the contradictory results its use can produce would be sufficient. While many cases have used the term in this context, none that we know of has defined it with any clarity. Indeed, the only principled way the term can be used is to distinguish strictly between all planning and preparatory actions and ones that implement policies.[22] But even the cases purporting to use an "operational" test fail to do so in a consistent or principled manner. The court of appeals here, for example, branded as "operational" various actions taken by federal regulators to advise and assist IASA in an attempt to avoid the use of harsher regulatory powers, even though such "jawboning" should have been seen as a clear example of nonoperational activities, since the agencies did not have actual control of IASA's operations. See pp. 37-38, *infra*. At the same time, the court found discretion in "the decision to replace the IASA Board of Directors with FHLBB approved persons, *and the actions taken to effectuate that decision*." Pet. App. 14a (emphasis added). Such internal inconsistencies can only leave the district courts and potential litigants to guess which activities will be labeled "operational" and which ones will not. In short, as one court that has rejected any "operational" limitation has put it, such a test is nothing more than a "conclusory analytical label[]" that tends only to obscure further an already difficult area. *Gray* v. *Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984).[23]

---

[22] That use of the word is derived by analogy from one standard definition, involving "execution of military or naval operations in campaign and battle as distinguished from training, testing, observation." *Webster's Third New International Dictionary* 1581 (1986). Other standard definitions of the word are either clearly inapposite ("ready for or in condition to undertake a destined function") or unhelpful ("of or relating to operation or an operation"). *Ibid.*

[23] Indeed, the facts of this case confirm the artificiality of any line between policy formulation and operational implementation. As dis-

B. The Challenged Actions Of The Federal Regulatory Officials Are Typical Of The "Discretionary Functions" That Congress Excepted From Liability Under The FTCA

Because the court of appeals misread *Indian Towing* and *Berkovitz*, it did not consider whether, under *Dalehite* and *Varig Airlines*, the challenged actions of the federal regulatory officials are immune from suit under the FTCA. This Court could therefore remand the case to the court of appeals for it to address that issue in the first instance. Such a remand would be appropriate, for example, if the Court were to conclude that it is necessary for the parties to develop the factual background to the challenged actions before the discretionary function question can be resolved. In our view, however, respondent's complaint cannot survive a motion to dismiss based on the discretionary function exception, and we therefore urge the Court to resolve that issue and uphold the district court's judgment.

1. The court of appeals held that many of the actions of the FHLBB officials with respect to IASA—including any decision to merge IASA with Investex and seek a neutralization agreement, and any decisions regarding the replacement of IASA's board of directors—were covered by the discretionary function exception. Pet. App. 13a-14a. At the same time, the court held that, under its "operational" test, federal regulators "lost the protection of § 2680(a) * * * when they began to advise IASA management and participate in management decisions," Pet. App. 14a. The court of appeals therefore reversed the district court's judgment, but only with respect to paragraphs 33 through 43 of the amended complaint, J.A.

---

cussed below, FHLBB offered guidance to IASA in lieu of more formal regulatory steps that were under consideration. Thus, the effective use of the sort of suasion brought to bear in a case like this is inextricably connected to the express powers of federal regulators, the direct exercise of which would unquestionably fall within the discretionary function exception.

13-17. Because respondent did not file a cross-petition challenging the dismissal of the other allegations, those paragraphs alone are relevant at this point.

Only four of those paragraphs allege that actions taken by the federal regulators were tortious.[24] One of the most striking features of those paragraphs is the extent to which they show that respondent's claims are based on *advice* given by the regulators to the new IASA management and directors installed in 1986. For example, respondent claims in paragraph 33 of the amended complaint that the federal regulators had "involved themselves in IASA's affairs" by "consult[ing] as to day-to-day affairs and operations of IASA," by "exchang[ing] information," and by "giving advice, making recommendations, urging, or directing action or procedures at IASA." J.A. 13-14. Although respondent alleges (in a conclusory fashion) that federal regulators "were not only consulted, but actually participated in management decisions," respondent makes no allegations reflecting what such "participation" possibly could have consisted of apart from the sort of advice and recommendations that the federal regulators are repeatedly alleged to have offered. IASA was a private corporation, Amended Compl. para. 6, J.A. 7-8, and the relevant paragraphs contain no allegations indicating how during the period in question federal regulators could conceivably have exercised any control over the corporation's assets or activities other

---

[24] Several of the paragraphs cited by the court of appeals do not contain any actual allegations of actions by federal regulators, but set forth respondent's allegations regarding injury and causation. See Amended Compl. paras. 35-36, 38-39, J.A. 16-17. Paragraph 37 alleges only actions taken by the IASA directors, paragraph 40 contains allegations about the stockholders' 1987 action electing persons other than those who had previously been approved by FHLBB as directors, and paragraph 43 simply recites the FHLBB's denial of respondent's administrative tort claim. See J.A. 16, 17. Accordingly, the only relevant paragraphs of the amended complaint setting forth factual allegations concerning actions taken by federal regulators are paragraphs 33, 34, 41, and 42, J.A. 13-16, 17.

than by offering advice and recommendations to the existing board and management.[25] Respondent might seek to prove that the federal regulators impliedly threatened to exert more formal authority over IASA if their advice went unheeded. See Amended Compl. paras. 21 & 29, J.A. 10, 12. But as discussed below, any such claim would only reinforce the link between the alleged actions and the pursuit of regulatory policies, and the existence of this link is one of the factors bringing those actions within the FTCA discretionary function exception.

Paragraph 34 of the amended complaint focuses on various specific acts, but they too all constitute the offering of advice to IASA management. Respondent alleges, for example, that federal officials "arranged for the hiring" of a financial consultant, Amended Compl. para. 34(a), J.A. 14. But he alleges no legal authority (and we are aware of none) that the federal regulators could have exercised to take that action other than by making a recommendation to IASA management. Similarly, respondent alleges that FHLB-D officials "urged or directed that IASA convert from a state-chartered savings and loan to a federally-chartered" institution, *id.* para .34(b), J.A. 14-15; that FHLB-D officials "gave advice and made recommendations concerning whether, when, and how to place IASA subsidiaries into bankruptcy," *id.* para. 34(c), J.A. 15; that FHLB-D officials "mediated salary disputes between IASA and its senior officers," *id.* para. 34(d), J.A. 15; and that FHLB-D officials "reviewed a draft complaint in litigation" and were involved in "giving

[25] In the paragraphs of the amended complaint that were not stricken, respondent frequently refers to actions of allegedly "hand-picked" officers and directors. *E.g.*, Amended Compl. paras. 33(c), 34, 34(c), J.A. 14-15. But the allegations underlying respondent's claim of liability based on the selection of these officers and directors appeared in a portion of the amended complaint, paras. 27-32, J.A. 12-13, that was stricken by the court of appeals as being squarely within the discretionary function exception. Pet. App. 14a. And, of course, the actions of these managers of a private corporation following their selection were not subject to the "direction" of federal regulators, only to their advice and recommendations.

advice, making recommendations, and directing matters related to IASA's litigation policy," *id.* para. 34(e), J.A. 15. One FHLB-D official is alleged to have exhorted IASA management to be mindful, in making its decisions, of the broad goal of preserving the FSLIC insurance fund. *Id.* para. 34(g), J.A. 15-16.

The allegations in paragraphs 34(f), 41 and 42 of the amended complaint, J.A. 15, 17, all involve alleged instances in which federal regulators are claimed to have urged state regulatory officials to take various actions regarding IASA. As discussed below, those actions (whether or not purely "advisory") fall even more clearly within the discretionary function exception.[26]

2. In determining whether the foregoing actions of the federal regulatory officials are protected by the discretionary function exception, the test is whether those actions were "grounded in social, economic, and political policy." *Varig Airlines*, 467 U.S. at 814. We submit that the foregoing actions are clear examples of precisely the type of "economic" judgments that the discretionary function exception protects.

a. FHLBB officials had to exercise a considerable degree of discretion when offering advice and assistance to IASA managers about such matters as whether to seek

[26] The federal regulators also did not act randomly. In addition to the precise character of the actions alleged, it is important to note the regulatory context in which these events arose. The background factual materials submitted to the district court flesh out that context somewhat. See pp. 5-6 note 6, *supra*. We recognize that issues such as the financial condition of IASA at various times entail factual questions that respondent might contest. But for present purposes, it is unnecessary to resolve or even address such disputed questions. We present these background matters here, as we did in the district court, simply to show that the federal "involvement" in IASA's affairs alleged by respondent did not occur in a vacuum, but came about in the course of regulatory activities and concerns. We do not understand respondent to dispute that basic proposition, but we also believe that respondent's complaint should be dismissed even if the specific regulatory context is not considered.

federally chartered status, whether to place particular subsidiaries into bankruptcy, or even whether to pursue a particular item of litigation on the corporation's behalf. As the court of appeals noted, the federal banking officials "did not have regulations telling them, at every turn, how to accomplish their goals for IASA." Pet. App. 12a. Lower courts have frequently applied the discretionary function exception to governmental decisions that would be considered purely "commercial" if engaged in by private parties. For example, in *Williamson* v. *United States Dep't of Agriculture*, 815 F.2d 368, 374-376 (5th Cir. 1987), the court recognized that decisions regarding the creditworthiness of individual loan applicants are discretionary functions in the context of a federal loan program. In *Kennewick Irrigation Dist.*, *supra*, the court held that decisions regarding the design of an irrigation canal are within the discretionary function exception, principally because of the need for government decision makers to weigh the "vital item of cost" in determining the appropriate design. 880 F.2d at 1027-1028.[27] Similarly, courts have recognized that government contracting decisions, judgments regarding trademark rights, and other commercial decisions fall within the scope of the exception. See *Gowdy* v. *United States*, 412 F.2d 525, 529 (6th Cir.) (award of contracts), cert. denied, 396 U.S. 960 (1969); *U.S. Gold & Silver Investments, Inc.* v. *Director, United States Mint*, 656 F. Supp. 380, 382-383 (D. Ore. 1987) (trademark), aff'd on other grounds, 885 F.2d 620 (9th Cir. 1989), cert. denied, 110 S. Ct. 3239 (1990); see generally L. Jayson, *supra*, §§ 249.04

[27] *Kennewick* also relied on *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). See 880 F.2d at 1029. In *Boyle*, this Court invoked the policies of the FTCA discretionary function exception in ruling that military equipment procurement decisions, which involve balancing of numerous considerations including cost, are matters with which state tort law cannot be allowed to interfere. See 487 U.S. at 511-512.

[5], 249.04[6], 249.04[7].[28] Those cases recognize that decisions affecting the public fisc "go[] to the heart of governmental activity." *Pennbank* v. *United States*, 779 F.2d 175, 180 (3d Cir. 1985) (refusal to grant loan is discretionary function). The principle that cost considerations can amount to the sort of "discretion" protected by the discretionary function exception stems from *Dalehite*, where this Court relied on such factors in ruling that various decisions about specific aspects of the fertilizer manufacturing process fell within the exception. See 346 U.S. at 40-41.

The regulatory choices facing FHLBB when it offered advice to IASA remove any doubt that the challenged activities are of the sort that Congress intended to protect from "judicial 'second-guessing' * * * through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814. As the district court in this case noted, Pet. App. 25a, a decision by FHLBB to invoke its more formal powers, such as issuance of a cease-and-desist order or placing IASA into conservatorship or receivership, would have been shielded from liability as a discretionary function.[29]

[28] Such results are also consistent with the traditional legal concept of governmental discretion, drawn from cases such as those involving mandamus, that this Court has recognized as pertinent to the FTCA exception. See *Dalehite*, 346 U.S. at 34. For example, in *Panama Canal Co.* v. *Grace Line, Inc.*, *supra*, the Court declined to review tolls set for use of the Panama Canal, on the ground that decisions setting such tolls involved discretionary choices regarding methods of accounting and cost allocation. 356 U.S. at 317-319.

[29] See *Golden Pacific Bancorp* v. *Clarke*, 837 F.2d 509, 512 (D.C. Cir.), cert. denied, 109 S. Ct. 223 (1988); *Taylor* v. *FHLBB*, 661 F. Supp. 1341, 1349-1350 (N.D. Tex. 1983); *Colony First Federal Savings & Loan Ass'n* v. *FSLIC*, 643 F. Supp. at 417; *FDIC* v. *Jennings*, 615 F. Supp. 465, 467-468 (W.D. Okla. 1985); *First Savings & Loan Ass'n* v. *First Federal Savings & Loan Ass'n*, 531 F. Supp. 251, 255 (D. Haw. 1981); *Newberg* v. *FSLIC*, 317 F. Supp. 1104, 1106-1107 (N.D. Ill. 1970). See also *FDIC* v. *Carter*, 701 F. Supp. 730, 736 (C.D. Cal. 1987).

Some district courts have suggested that the discretionary function exception does not apply when the government goes beyond

The courts have also recognized the corollary that a decision by federal banking regulators *not* to take regulatory actions is similarly within the exception.[30] Decisions like these involve "innumerable subtle judgments * * * that draw upon a mix of law, accounting, bank custom, and policy," and are typical of the actions that the discretionary function exception was designed to protect. *Golden Pacific Bancorp* v. *Clarke*, 837 F.2d 509, 512 (D.C. Cir.), cert. denied, 109 S. Ct. 223 (1988).

---

its role as regulator and substitutes its decisions for those of a bank's officers and directors. See *FDIC* v. *Renda*, 692 F. Supp. at 136 (dictum); *In re Franklin Nat'l Bank Securities Litigation*, 445 F. Supp. 723 (E.D.N.Y. 1978). Those decisions, however, make essentially the same error as did the court of appeals in this case, *i.e.*, they suppose that application of the discretionary function exception turns on whether an agency has exercised "operative control," *Renda*, 692 F. Supp. at 136, rather than on a careful assessment of the nature of any discretion exercised. Indeed, *Franklin National Bank* misapplied this Court's decision in *Indian Towing* in the same way as did the court below. See 445 F. Supp. at 735. *Franklin National Bank* also confused the issue of whether the United States has assumed a duty upon which tort liability could be based, see *id.* at 731-735, with the issue of whether the discretionary function exception applies. As explained above, the two issues are conceptually distinct, and the arguable (or even proven) assumption of a duty says nothing about whether actions carrying out that duty are discretionary. See pp. 27-28 note 16, p. 30, *supra*.

[30] See *FDIC* v. *Mmahat*, 907 F.2d 546 (5th Cir. 1990); *Emch* v. *United States*, 630 F.2d 523, 527 (7th Cir. 1980), cert. denied, 450 U.S. 966 (1981); *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F.2d 863, 870 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978); *FDIC* v. *Manatt*, 723 F. Supp. 99, 103-104 (E.D. Ark. 1989). See also *Successor Trust Committee* v. *First State Bank, Odessa*, 735 F. Supp. 708, 716-717 (W.D. Tex. 1990) (FDIC statements regarding possible buy-back of loans constitute discretionary function); *Colorado State Bank* v. *FDIC*, 671 F. Supp. at 708-709 (same, FDIC actions regarding disposition of assets of failed institution); *Magellsen* v. *FDIC*, 341 F. Supp. 1031, 1035-1037 (D. Mont. 1972) (same, FDIC delay in acting on insurance application).

The court of appeals acknowledged that FHLBB's use of informal suasion in an effort to help IASA improve its condition, rather than immediately employing more intrusive regulatory mechanisms, was an "unchallenged" aspect of the agency's broad regulatory powers. Pet. App. 12a; pp. 26-27, *supra*. What the court of appeals failed to recognize, however was that the decision to proceed in this manner, and the continuing decisions as to what sort of guidance IASA needed, were themselves highly discretionary decisions regarding the conduct of the agency's regulatory responsibilities. Another lower court, dealing with an analogous situation involving the federal regulation of airport safety, has recognized the discretionary nature of such activities:

> [T]he Secretary was acting as a governmental policy-maker in his decision to apply negotiation and diplomacy rather than legal measures. Weighing the governmental interest in insuring the most efficient use of federal funds against such remedies as closing down the airport or instituting other legal sanctions and deciding in favor of a less antagonistic approach clearly constitutes the type of discretion reflected in the history of the FTCA.

Sellfors v. *United States*, 697 F.2d 1362, 1368 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984). Similarly, FHLBB's decisions to offer advice to IASA, rather than resort immediately to sterner regulatory measures, were simply an aspect of its highly discretionary, policy-oriented judgment about "whether and how to intervene" in that institution's affairs. *FDIC* v. *Jennings*, 615 F. Supp. 465, 467 (W.D. Okla. 1985).

Accordingly, any advice and guidance FHLBB offered to IASA must be recognized as integral to its broader regulatory activities. The ultimate goal of such activities is, of course, "to preserve depositor confidence in the savings institutions of this country and to minimize loss and depletion of FSLIC insurance funds." *Woods* v. *FHLBB*, 826 F.2d 1400, 1411 (5th Cir. 1987), cert. denied, 485

U.S. 959 (1988). Just as the FAA inspectors in *Varig Airlines* necessarily exercised their discretion "for the advancement of [the] governmental purpose" of aircraft safety, 467 U.S. at 820, the FHLBB officials whose actions are at issue here exercised their authority with an eye to the broad regulatory policies under which they operate. For example, in advising IASA managers to engage a consultant, to close a particular subsidiary, or even to file a lawsuit, the federal regulators were making judgments concerning the best way to further the regulatory goals of preserving the institution's soundness, for the ultimate purpose of safeguarding federal deposit insurance funds. Nor can it be doubted that a federal regulator's advice to an institution to convert to federally chartered status is a judgment grounded in regulatory policy. Furthermore, because all of these actions were taken in lieu of pursuing more formal regulatory actions, including receivership, federal regulators also had to consider at every juncture whether the particular actions they recommend were likely to produce beneficial results justifying the agency's continued forbearance from formal proceedings. Such decisions call for the exercise of discretion and expertise, are ultimately related to broad policy goals, and, as this Court recognized in *Varig Airlines*, are precisely the kinds of decisions that must be shielded from liability by the discretionary function exception.

The only allegations of actions by FHLBB officials other than giving advice to IASA were that FHLBB officials "actively intervened" with state regulatory bodies concerning IASA, "asked the State" to delay certain regulatory actions, and later "repeatedly requested" state officials to close IASA. Amended Compl. paras. 34(f), 41, 42, J.A. 15, 17. Any such actions, however, are even more obviously part of FHLBB's discretionary functions. Just as a federal regulatory agency's own enforcement decisions constitute highly discretionary determinations that cannot support an FTCA claim, surely an action

by a federal agency to urge state officials to exercise their discretionary authority in a particular way is also a discretionary matter, related to regulatory policies, which the courts are ill-equipped to second-guess. See *Taylor* v. *FHLBB*, 661 F. Supp. at 1349 (indicating that discretionary function exception applies, inter alia, to FHLBB request to state authorities to issue cease and desist order).

b. Although the doctrine of sovereign immunity has its roots in the historical prerogatives of the English monarchs, this Court has recognized that the doctrine has continuing vitality, and is grounded in policy considerations consonant with the principles of democratic government. See, *e.g.*, *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938). In the specific context of the FTCA, one court has identified "three principal themes" in the modern justifications for sovereign immunity, noting that each is directly pertinent to the important purposes served by the discretionary function exception. See *Gray* v. *Bell*, 712 F.2d at 511. First, separation of powers principles militate against judicial interference with discretionary, policy-based decisions of the coordinate, political branches.[31] Second, "courts should not subject the sovereign to liability where doing so would inhibit vigorous decisionmaking by government policymakers." *Ibid.* Third, "courts should be wary of creating huge and unpredictable governmental liabilities" by permitting damage claims based on policy decisions with broad impact. *Ibid.* See also *OPM* v. *Richmond*, 110 S. Ct. 2465, 2476 (1990). Each consideration reinforces the importance of recognizing the "discretionary" nature of the informal regulatory actions at issue.

---

[31] Separation of powers principles have been recognized as underlying the discretionary function exception. See *Laird* v. *Nelms*, 406 U.S. 797, 812 n.11 (1972) (Stewart, J., dissenting); *In re Joint Eastern & Southern Districts Asbestos Litigation*, 891 F.2d 31, 35 (2d Cir. 1989); *Kennewick Irrigation Dist.*, 880 F.2d at 1021-1022.

Imposing tort liability on the United States based on the kinds of actions taken in this case can only hobble and confine federal efforts to deal with the current crisis affecting the savings and loan industry. Even apart from the general tendency of such tort liability to "inhibit vigorous decisionmaking" by government officials, the range of claims that would be permitted under the court of appeals' ruling would have especially pernicious effects by restricting and skewing regulatory efforts. It is widely recognized that decisions by federal regulators to invoke formal regulatory powers against financial institutions fall well within the scope of the discretionary function exception. If liability is to be imposed when federal regulators act informally to assist troubled institutions in an effort to obviate more drastic measures, the resulting incentive is clear: Regulators will be encouraged to avoid such efforts, to stand mute while the institution deteriorates, and then invoke their "discretionary" powers. Such an incentive would be perverse, given the congressionally recognized need to encourage flexible and decisive action by thrift regulators. Constriction of regulatory options "through the medium of [actions] in tort" is precisely the sort of interference with policy judgments that Congress sought to avoid by the discretionary function exception. See *Varig Airlines*, 467 U.S. at 814.[32]

Imposition of tort liability in this context, moreover, poses an extraordinarily grave danger of "creating huge and unpredictable governmental liabilities." *Gray* v. *Bell*, 712 F.2d at 511. An unprecedented number of thrifts,

[32] Moreover, the decision below, by characterizing as "operational" actions with respect to matters of an institution's basic financial integrity, has opened the door to disgruntled creditors to bring suit against the United States concerning day-to-day problems in the institution—problems that, in a time of crisis, the regulators did not and could not address in their advice. At least one such suit is pending in federal district court, *McNeilly* v. *United States*, No. CA3-88-1853-H (N.D. Tex.).

totalling at least several hundred, are now either insolvent or "troubled." See H.R. No. 54-(I), 101st Cong., 1st Sess. 294, 303 (1989). As the damage prayer in the present case reflects,[33] the amount of the financial loss in any individual thrift failure is likely to be large indeed. Taken together, these factors show that imposition of liability in cases of this sort could result in staggering financial losses to the federal government. The prospect of such losses would inevitably further chill the vigor of enforcement efforts.

Finally, the need to defer to the economic judgment of the federal banking agencies reinforces the impropriety of permitting tort claims in this area. Administrative agencies, including the FDIC and the newly created Office of Thrift Supervision, will continue to undertake the difficult day-to-day tasks of thrift regulation, tasks that require 'innumerable subtle judgments * * * that draw upon a mix of law, accounting, bank custom, and policy." *Golden Pacific Bancorp*, 837 F.2d at 512. The federal courts are ill-equipped to "second-guess" these subtle judgments, or the congressional policies upon which they are based.

[33] Although the court of appeals dismissed all but $25 million of respondent's claims, on the ground that he could not sue for the loss in value of IASA stock that he and other shareholders allegedly suffered, the total loss for which recovery was sought in this case was $100 million. Amended Compl. para. 59, J.A. 19

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
JOHN F. DALY
Attorneys

AUGUST 1990

---

* The Solicitor General is disqualified in this case.

APPENDIX

STATUTORY PROVISION INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 2680, provides in relevant part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20065